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No. 03-1299

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUMPROVIDENT CORPORATION,

Petitioners,

v.

JANCYE H. TIERNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth District Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a disability insurance plan procured by three owner/managers of an S corporation that covers only the three owner/managers and no non-owner employees is governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA")?

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OBJECTION TO JURISDICTION

This Court does not have jurisdiction to consider hearing UNUM's Petition for Writ of Certiorari. UNUM contends that this Court has jurisdiction under 28 U.S.C. § 1257(a) because the decision on review involves a title, right, privilege or immunity claimed under a federal statute. UNUM, however, neglects to address or even mention an essential element of § 1257(a), namely, the express limitation of this Court's jurisdiction to "[f]inal judgments or decrees rendered by the highest court of a State." UNUM omits this essential element because the El Paso Court of Appeals' judgment in this case clearly does not meet the § 1257(a) finality requirement.

The court of appeals' judgment in the case at hand clearly does not qualify as final under a literal reading of the requirement. The court of appeals merely reversed two summary judgments rendered in favor of UNUM and remanded the case for further proceedings consistent with the court's opinion. On remand, Tierney is arguing that there are separate plans for the three owner/managers of the corporation and the nonowner/employees, and that the separate nature of the owners plan negates UNUM's ERISA defense based on three grounds.[1] The state courts,

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[1] In a motion for partial summary judgment filed after remand, Tierney has argued that ERISA does not apply because: (1) the owners plan does not cover any employees (the issue that is the subject of UNUM's Petition to this Court); (2) the owners plan meets the requirements of the safe harbor provisions of 29 C.F.R. §§ 2510.3-1(j)-(4) (1992); and (3) UNUM cannot meet the third prong of the ERISA analysis, namely, whether the owners plan was created or maintained by the employer for the benefit of its employees. See *Meredith v. Time*

(Continued on following page)

including the jury, may decide that there are indeed separate plans and that ERISA does not apply for one or more of the reasons Tierney is arguing. The state courts might ultimately decide that there are separate plans but ERISA applies regardless.[2] It is also possible that the courts might decide over Tierney's objections that there is but one plan covering both owners and employees. In that case, the state courts will have to determine whether Tierney can meet the threshold of recovery under ERISA. Regardless of the ultimate outcome, one thing is certain: the state courts have many issues, both federal and state, to decide before their decision ultimately becomes final under a literal reading of the jurisdictional statute.

Although a plain reading of the finality requirement would preclude the exercise of jurisdiction "where anything further remains to be determined by a State court," this Court has recognized four very narrow categories of exceptions to such a literal reading of the limitation. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 95 S.Ct. 1029, 1037, 43 L.Ed.2d 328 (1975). The question then becomes whether this case fits under any of the four very

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Ins. Co., 980 F.2d 352, 355 (5th Cir. 1993). The trial court denied the motion, stating that the issues will be determined at trial.

[2] The fact that the Texas Supreme Court declined to grant UNUM's Petition for Review from the court of appeals' reversal of the summary judgments does not foreclose the possibility that the Texas Supreme Court might hear an appeal from a final judgment in this case. The law of the case doctrine is not absolute, but is to be applied by the appellate courts in a discretionary manner according to the circumstances of each case. See *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716-717 (Tex. 2003) (holding that the law of the case doctrine does not apply to findings that were clearly erroneous). Therefore, the Texas Supreme Court has not necessarily had its final say on this matter.

narrow categories of exceptions. UNUM has offered this Court no guidance on this issue, instead choosing to stick its head in the sand by pretending that the finality requirement does not even exist. UNUM surely would have briefed the issue and argued for application of one of the exceptions if it believed it could advance a reasonable argument. Having failed to do so, UNUM has opened itself up to the assumption that UNUM did not believe it could make a good faith argument. Indeed, a review of the exceptions reveals that none of them apply here.

It should first be noted that this Court has observed that "in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceeding, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621, 101 S.Ct. 1958, 1960, 68 L.Ed.2d 489 (1981). In the case at hand a number of federal issues remain to be resolved. As noted above, the state courts may need to decide issues regarding the safe harbor regulations, the third prong of the ERISA analysis, and proper application of the sliding scale of reasonableness applicable to administrators operating under a conflict of interest. Review of the isolated issue presented by UNUM in its Petition for Writ of Certiorari will not resolve these other federal issues, thereby creating the real possibility of piecemeal review of federal issues rejected by this Court in *Flynt*. Thus, this Court can and should refuse to exercise jurisdiction over UNUM's Petition on this basis alone without the need to even look at the four exceptions.

In any case, a review of the four exceptions reveals that none applies in the case at hand. The first category of

exceptions includes cases in which "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp*, 420 U.S. 469, 479, 95 S.Ct. 1029, 1037. Resolution of the issue UNUM presents to this Court by way of its Petition will not be conclusive on the outcome of this case. As discussed above, Tierney has raised additional alternative grounds to support a finding that ERISA does not apply. Also, no final decision has been made as to whether a separate owners plan exists and, if not, whether Tierney can still recover in the face of ERISA. Most importantly, the Texas Supreme Court has not necessarily had its final say on the issue of whether ERISA would apply to a separate owners plan. Again, that court may still review the issue at the conclusion of the trial below.[3] Thus, the first exception does not apply.

The second category of exceptions includes those cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision

[3] UNUM wrongly suggests that the Texas Supreme Court may not have jurisdiction to review the ERISA question. Although Tierney did question that court's jurisdiction, UNUM cited the court to *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 397 (Tex. 1979) (holding that the Texas Supreme Court has implied jurisdiction to correct the judgment of a court of appeals that conflicts with the supreme law of the land as expressed by Congress and the United States Supreme Court). Moreover, the Texas Supreme Court apparently agreed with UNUM on the jurisdictional question in that it requested briefing on the merits and ultimately denied the petition instead of dismissing the petition for want of jurisdiction.

regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480, 95 S.Ct. 1029. This exception does not apply for many reasons. For example, as set forth above, Tierney is arguing alternative grounds to defeat UNUM's ERISA defense that are not dependent on the issue presented by UNUM's Petition to this Court. Thus, the Texas courts might hold on a second appeal that ERISA does not apply because the owners plan falls within the safe harbor provisions and not even reach the legal issue UNUM is presenting here. See *Florida v. Thomas*, 532 U.S. 774, 779, 121 S.Ct. 1905, 1909, 150 L.Ed.2d 1 (2001) (holding that the second exception does not apply where on remand an alternative basis may make resolution of the issue unnecessary). It is also possible that the Texas courts could conclude that there is only one plan and ERISA does apply, which would render UNUM's present argument moot. There are many more combinations of possibilities that would render UNUM's present contention moot. Therefore, the second exception fails.

The third category of exceptions is where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481, 95 S.Ct. 1029. Again, both the Texas Supreme Court and the court of appeals may still review the federal issue raised by UNUM on a second appeal. See *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716-717 (Tex. 2003). Therefore, the third exception does not apply.

The fourth and final category includes those cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on

nonfederal grounds, thus rendering unnecessary review of the state court on the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in the state proceedings to come. In these circumstances, if a refusal to immediately review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Cox*, 420 U.S. at 482-483, 95 S.Ct. 1029. Once again, this exception depends on the federal issue being finally decided by the state courts, a requirement that is absent in the case at hand. The Texas Supreme Court's refusal to consider the reversal of a summary judgment is by no means final inasmuch as that court may still consider the matter later. Moreover, nothing about the court of appeals' holding could seriously erode federal policy.[4] In *Flynt*, this Court recognized that the cases falling under the fourth exception "involved identifiable federal or constitutional policies which would have been undermined by the continuation of the litigation in state courts." 451 U.S. at 622, 101 S.Ct. 1958. As UNUM recognizes in its briefing, however, state courts have concurrent jurisdiction to adjudicate ERISA claims. Petition for Writ of Certiorari at 4, n. 1. Therefore, continuation of this case in state court, whether ultimately

[4] Indeed, the court of appeals' published opinion has not been cited by any other court (other than the same court of appeals on an issue of state court procedure).

under ERISA or not, will not undermine any federal statutory or constitutional policy. "A contrary conclusion would permit the fourth exception to swallow the rule." 451 U.S. at 622, 101 S.Ct. 1958.

After reviewing the four categories of exceptions, it is not hard to understand why UNUM chose not to argue for application of any of them to the case at hand. What is surprising, however, is that UNUM attempted to invoke this Court's jurisdiction without a candid consideration of this Court's limited jurisdiction in cases arising from state courts. In so doing, UNUM has wasted Tierney's time and resources as well as the precious time and resources of this Court. Tierney respectfully requests that this Court summarily reject UNUM's Petition for Writ of Certiorari for want of jurisdiction.

STATEMENT OF THE CASE

UNUM's Statement of the Case does not fairly and accurately set forth the facts necessary for a proper determination of UNUM's Petition. Therefore, Tierney submits her own statement. In 1997, Jancye Tierney ("Tierney") was one of three (not "several" as stated by UNUM) owner/managers of Special Insurance Services ("SIS").[5] In the Spring of 1997, the owners of SIS decided to procure a long term disability policy through UNUM Life Insurance Company of America ("UNUM"). UNUM

[5] Although UNUM's summary judgment motion did not clearly establish what type of entity SIS is, the record suggests that SIS is an S corporation.

issued a policy that created multiple benefit plans, one for owners and a separate one for non-owner/employees.[6] The plans differed in several different respects, including the source of funding (the owners paid for their coverage while SIS paid for the employees'), the definition of disability, the amount of coverage, and the length of payments. Moreover, the plans were set up to be separate and independent of one another in that one plan could be terminated or modified without affecting the other.

In the Spring of 1998, Dr. John Mathias evaluated Tierney, a single mother, for chronic abdominal pain and constipation. Dr. Mathias performed objective tests on Tierney, which indicated a gastrointestinal motor dysfunction with ampulla of Vator-duodenal wall spasms. In September of 1998, Tierney filed a claim for long-term disability benefits with UNUM on account of her abdominal condition. UNUM determined that Tierney was disabled and accepted her claim in November of 1998.

At the time UNUM accepted Tierney's claim, it believed that she might respond quickly to treatment and return to work within a matter of months. In April of 1999, however, UNUM concluded that Tierney was not likely to improve for quite some time, if ever. UNUM was unwilling to pay Tierney's claim indefinitely and, therefore, it devised a blueprint for terminating Tierney's claim, a scheme totally at odds with UNUM's contemporaneous

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[6] Throughout its briefing before this Court, UNUM asserts that SIS sponsored the owners plan. This assertion, however, is incorrect. Tierney presented summary judgment evidence that SIS did not sponsor the owners plan. Instead, the owners themselves elected to obtain coverage for their own interests separate from the employees.

conclusion that Tierney's condition was unchanged from the time UNUM had accepted the claim. The plan was to obtain a forensic file review from a GI specialist to determine whether Tierney did indeed have gastric dysmotility disorder. If it was determined that she did *not*, the adjuster concluded that the self-reported symptom limitation[7] would apply. If, however, the review showed that she did have the disorder, then UNUM would conduct surveillance on Tierney in hopes of showing that she was not really disabled.

UNUM conducted surveillance of Tierney in June of 1999, but the surveillance found nothing inconsistent with Tierney's reported condition. In October of 1999, Dr. Kumar Gutta performed an "Independent Medical Examination" of Tierney. Dr. Gutta issued to UNUM a written report of the examination in which he affirmed Dr. Mathias' diagnosis that Tierney was suffering from a gastric dysmotility disorder and recognized the disabling effect of such a condition.

Despite the fact that both prongs of UNUM's plan to terminate Tierney's benefits had failed, UNUM terminated the benefits anyway. Tierney asked UNUM to reconsider its termination, but, in May of 2000, UNUM informed her that it was standing by its decision. Tierney filed the present action in a state district court in June of

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[7] The policy limits to twelve months benefits payable due to disabilities caused by symptoms that are not verifiable using tests, procedures or clinical examinations. The limitation does not apply where the symptoms are associated with a medically diagnosed condition. See *Russell v. UNUM Life Ins. Co. of America*, 40 F.Supp.2d 747 (D.S.C. 1999).

2000. UNUM removed the suit to a federal district court on July 25, 2000, on the ground that Tierney's suit related to a policy of insurance that qualified as an ERISA employee benefit plan and thus, UNUM argued, was subject to complete federal preemption. Tierney filed a motion to remand. On February 12, 2001, the federal district court remanded the action on the basis that UNUM had failed to establish that the insurance policy in question was an employee welfare benefit plan within the meaning of ERISA. UNUM filed a second notice of removal once again based on ERISA. Tierney filed a motion to remand with the federal court, which the federal court granted along with ordering UNUM to pay sanctions for a groundless removal.

Despite the fact that the federal court had determined that ERISA did not apply, UNUM moved for summary judgment in state court based on ERISA preemption. Tierney argued in response that her claim came under a separate plan that covered only owners and not employees and, therefore fell outside of ERISA. UNUM argued that the policy created only one plan covering both owners and employees. The trial court agreed with UNUM, finding that only one plan was created and rejecting Tierney's safe harbor argument as to that plan. The trial court went on to enter two summary judgment orders, one directed to Tierney's state court claims, and the other upholding UNUM's decision to terminate Tierney's disability benefits.

Tierney appealed from these orders, again arguing that the policy created a separate owners plan to which ERISA does not apply. In response, UNUM argued for the first time in the litigation that ERISA applies even to a separate owners plan because the owners are shareholders

of a corporation. The El Paso Court of Appeals rejected UNUM's argument, reversed the summary judgments and remanded the case,[8] holding that UNUM had failed conclusively to establish that ERISA applies to this action. UNUM petitioned the Texas Supreme Court to review the court of appeals' judgment, but the higher court denied UNUM's petition after considering briefing on the merits.

On February 13, 2004, the court of appeals issued its mandate remanding the case to the trial court. Tierney subsequently filed a motion for partial summary judgment asking the trial court to find as a matter of law that Tierney's claim for benefits is made under a separate owners plan. Tierney argued that ERISA does not apply to the owners plan for three independent reasons: (1) the owners plan does not cover any employees; (2) the safe harbor requirements are met when applied separately to the owners plan; and (3) SIS neither created nor maintained the owners plan for the benefit of its employees. The trial court heard the motion on April 6, 2004, and denied it, stating that fact issues remained to be determined by a trial. A jury trial is scheduled for November 29, 2004.

[8] UNUM's suggestion that the court of appeals remanded the case for consideration only of the issue of whether a separate owners plan exists is misleading. The court clearly remanded the case for further proceedings consistent with the opinion and nothing in the opinion limits the scope to that one issue. App. 8, App. 10.

REASONS FOR DENYING THE WRIT

I. THE STATE COURT DECISION DOES NOT CONFLICT WITH *YATES*

UNUM's reliance on this Court's recent opinion in *Yates v. Hendon*, ___ U.S. ___, 124 S.Ct. 1330 (2004) is misplaced. This Court held in *Yates* that a working owner of a professional corporation qualified as a participant of an ERISA pension plan so long as the plan covers one or more employees other than the working owners and their spouses. 124 S.Ct. at 1336. In the case at hand, however, Tierney has never contended and the court of appeals did not hold that Tierney would not qualify as a "participant" should it be determined that the owners plan fell under ERISA. Indeed, the court of appeals expressly recognized that ERISA would apply if the plan covered both employees and owners. App. 6-7; *citing Vega v. Nat'l Life Ins. Servs., Inc.*, 188 F.3d 287, 294 (5th Cir. 1999).

The issue in the case at hand is not whether Tierney would qualify as a participant of the owners plan should it be found to constitute an ERISA plan, but whether the owners plan itself falls under ERISA. Tierney contends that the separate owners plan does not fall under ERISA because the plan covers no employees who are not working owners and because the plan, which is one hundred percent contributory, falls under the safe harbor. The holding in *Yates* does nothing to impact either of these arguments. Indeed, the holding in *Yates* expressly recognizes the fact that the plan must cover at least one employee who is not a working owner in order for the plan to come under ERISA.

In *Yates*, this Court determined that Congress intended working owners to qualify as plan participants

and, therefore, there was no need to resort to the common law to determine the issue. 124 S.Ct. at 1342. Again, the issue of "participant" is distinct from the issue of whether an ERISA plan exists. Not applying ERISA to plans covering only working owners makes sense in the context of ERISA's stated purpose: "Safeguarding the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan." *Meredith v. Time Ins. Co.*, 980 F.2d 352, 358 (5th Cir. 1993) Where the employee and the owner are one and the same, this need is not present. *Id.* Nothing in *Yates* alters this analysis. Indeed, *Yates* expressly recognized: "Courts agree that if a benefit plan covers only working owners, it is not covered by Title I (of ERISA)." 124 S.Ct. at 1345, n. 6.

UNUM appears to be arguing that *Yates* is important to the case at hand because *Yates* tangentially touches on 29 C.F.R. § 2510.3-3(c)(1), (2), which UNUM contends is controlling in the case at hand. UNUM itself admits, however, that the regulation did not apply in *Yates* because the plan covered other non-owner employees. Moreover, § 2510.3-3(c)(1), (2) should not be applied as narrowly as UNUM suggests. The regulation clarifies that a plan that does not cover any employees does not qualify as an ERISA plan. The regulation states that sole proprietors and partners are not employees. This creates a type of a "safe harbor" that applies regardless of the level of control the owner or particular partner exercises over the enterprise. The regulation does not go on to say that in no case can any other individual be considered an employer.

UNUM relies on a 1976 Department of Labor opinion letter, which answers a question posed by an unnamed party asking for confirmation that a pension or profit

sharing plan whose only participants are shareholders and spouses of shareholders of the employer do not need to comply with the reporting requirements of ERISA. The opinion letter simply quotes section 2510.3-3(c)(1), which provides that an individual owner of a wholly owned incorporated business is not an employee where the stock is owned by the individual or his or her spouse. The letter concludes that the party's position is correct if the company is wholly owned by one shareholder. The regulation does nothing more than provide a safe harbor for sole proprietorships and partnerships. The letter opinion only states that the questioner is not correct in assuming that no reporting is required unless it falls within that safe harbor. It does not state that all other corporations conclusively fall within the ambit of ERISA. To the extent the letter opinion could be read as concluding that the regulation prohibits courts from treating S corporations the same as partnerships and sole proprietorships, the letter opinion would be entitled to no weight whatsoever. This Court has made clear that a letter opinion from the Department of Labor is entitled to "respect," but only to the extent that it has the power to persuade. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1665, 1663, 146 L.Ed.2d 621 (2000). The reason the Court gave for giving a letter opinion little to no deference is the fact that the letter was not generated with the same deliberative process as regulations and other agency guidelines. *Id.* The 1976 letter opinion does nothing more than parrot back the text of the regulation. It offers no analysis or discussion of intent that could persuade a reasonable person to conclude that the regulation was anything other than a safe harbor.

The regulation expressly provides that partners of a partnership are not to be counted as employees for purposes of determining whether a plan falls under ERISA. Although the record before the court of appeals is not clear, it appears that SIS was an S corporation.[9] An S corporation is a hybrid between a corporation and a partnership. See *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 85 (N.D.N.Y. 2003). In fact, with respect to fringe benefits, such as disability insurance, the Internal Revenue Code expressly states that shareholders such as the three owner/managers of SIS are treated as partners of a partnership. See 26 U.S.C. § 1372.[10] Thus, SIS acted as a partnership with respect to the UNUM policy acting through its three owner/managers and the owners should be treated as partners in determining whether an ERISA plan was established. See, e.g., *House v. American United Life Ins. Co.*, 2002 WL 31729483 (E.D. La.) (treating shareholders of a limited liability company as partners for purposes of the ERISA analysis). The result of treating the three working owners of SIS as partners is that the separate owners plan does not cover any non-owner employees and, thus, does not fall under ERISA.

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[9] Tierney has clearly established that SIS is an S corporation in her motion for partial summary judgment filed with the trial court on remand.

[10] That section provides:

> **§ 1372. Partnership rules to apply for fringe benefit purposes**
>
> **(a) General rule.** – For purposes of applying the provisions of this subtitle which relate to employee fringe benefits –
>
> **(1)** the S corporation shall be treated as a partnership, and
>
> **(2)** any 2-percent shareholder of the S corporation shall be treated as a partner of such partnership.

II. THE COURT NEED NOT REVIEW THE STATE COURT DECISION TO RESOLVE ANY CONFLICT BETWEEN THE CIRCUITS AND THE STATE COURTS

UNUM attempts to create a clear conflict among the circuits by relying on an unpublished Ninth Circuit opinion (which does not even address the issue on its face) as well as speculation as to what the Fifth Circuit might decide in a pending appeal. The truth of the matter is that the cases on which UNUM relies for the proposition that joint shareholders are not working owners are now seriously in question in light of this Court's opinion in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003).

The issue decided by this Court in *Clackamas* was whether four shareholder/directors of a professional corporation are to be considered employers or employees of the corporation for purposes of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. The ADA applies only to employers who have at least 15 employees. The issue of whether the corporation met the threshold depended on whether the four shareholders were employers or employees. The Court noted that the Ninth Circuit had rejected an economic realities approach on the basis that a corporation should not be permitted to secure the "best of both possible worlds" by being allowed to invoke its corporate status to reap tax advantages and avoid civil liability and then argue that it is more like a partnership in an attempt to avoid the ADA. 123 S.Ct at 1676. Thus, the Ninth Circuit employed the same analysis as the cases upon which UNUM relies in the case at hand.

This Court, however, rejected the Ninth Circuit's strict corporate structure approach. The Court first turned to

the ADA's definition of employee and found it to be identical to ERISA's definition, "an individual employed by an employer." The Court, therefore, turned to *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), which involved the issue of whether a particular individual was an employee or an independent contractor under ERISA. The Court noted that, as it had explained in *Darden*, Supreme Court cases concerning similar statutory language give "guidance on how best to fill the gap in the statutory text." 123 S.Ct. at 1678. The Court found that *Darden* had adopted a common law approach to determining whether an individual is an employee. The Court found, however, that the factors used in *Darden* were intended to distinguish between an employee and an independent contractor and, therefore, do not apply where the inquiry is whether a shareholder is an employee of an employer. *Id.*

That is not to say that the Court rejected *Darden*'s premise. Indeed, the Court embraced *Darden*'s decision to look to the common law notion of master-servant as offering helpful guidance. 123 S.Ct. at 1679. The Court noted that the focus of the relevant factors in defining the master-servant relationship is control and approved of six factors developed by the EEOC that focus on the "touchstone of control."[11] *Id.* at 1679-80. The Court summed up

[11] These factors are: (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individuals work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses and liabilities of the organization.

the analysis by declaring that "an employer is the person, or **group of persons**, who owns and manages the enterprise." *Id.* at 1680 (emphasis supplied). Finally, the Court held that, as was the case in *Darden*, the answer to whether a shareholder is an employee or an employer depends on all of the incidents of the relationship and no one factor is decisive. *Id.* Applying the analysis to the facts before it, the Court held that the evidence in the record was not conclusive and, therefore, remanded the case for determination consistent with the Court's holding. *Id.*

Although *Clackamas* arose under the ADA, the same reasoning applies to ERISA. Indeed, the Court relied heavily on the Court's reasoning in *Darden* in deciding to reject the Ninth Circuit's strict corporate structure approach in favor of a control analysis based on economic realities. The reasoning of this Court in *Clackamas* applies in the ERISA context for the same reason the reasoning of *Darden* applied in the ADA context – both statutes use the same definition of "employee." Thus, this Court has firmly rejected the strict corporate veil stance advocated by UNUM in favor of an economic reality analysis focusing on the common law notion of control and, thus, has rejected the reasoning of the cases upon which UNUM relies.

Even if this Court did decide that it can and should grant UNUM's petition and reverse the state court judgment, the state court of appeals may still reach the same conclusion on state court procedural grounds. Tierney argued to the court of appeals that UNUM had waived its joint shareholder argument by not raising that argument first before the trial court. Although the court of appeals apparently ruled on the merits of UNUM's argument, on remand the court could decide that UNUM did indeed waive its argument. See *Stiles v. Resolution Trust Corp.*,

867 S.W.2d 24, 26 (Tex. 1993) (summary judgment may not be affirmed on grounds not specifically set forth in the trial court); *DeWoody v. Rippley*, 951 S.W.2d 935, 942 (Tex.App. – Fort Worth 1997, writ dis'm by agr.) (appellee waived argument not made in connection with summary judgment); *Dickey v. Dickey,* 908 S.W.2d 311, 313 (Tex.App. – San Antonio 1995, no writ) (legal argument not made in support of summary judgment motion may not be raised on appeal); *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 124 (Tex.App. – Houston [14th Dist.] 1994, no writ) (same). Tierney respectfully submits that this Court should not expend its valuable judicial resources reviewing an issue that has not been properly preserved.

UNUM's argument that plan administrators must have a bright line test for determining whether ERISA applies to a given plan rings hollow. UNUM ignores the fact that determining whether a plan exists is just one of the three prongs of the analysis of whether ERISA applies. The other prongs, the four elements of safe harbor and the issue of whether the employer created or maintained the plan for the benefit of its employees, are fraught with issues of fact requiring discovery and determination by the courts. Thus, even if a bright line test is imposed on the issue of whether a plan exists in the case at hand, an insurer would still have to resolve the factually charged issues of safe harbor and of the employer's intent in order to determine whether ERISA applied to the plan. UNUM offers the Court no rationale to justify sacrificing congressional intent in order to create a bright line test as a minor short cut in an inherently fact-laden area. Indeed, UNUM has no one but itself to blame for developing and marketing a policy that created a separate plan for the owners of an S corporation.

UNUM is also disingenuous in its suggestion that Tierney is in need of ERISA protection. UNUM has attempted to use ERISA as a virtually impenetrable shield to protect itself from any liability for its bad faith denial of the disability benefits Tierney so desperately needs. The three working owners of SIS sought only to purchase disability insurance and were in no need of protection from each other. Again, the three are treated as partners with respect to the provision of fringe benefits to each other and should be treated no differently for ERISA purposes.[12] It is unconscionable for a disability insurer to invoke the safeguarding attributes of ERISA in order to deny a working owner the disability benefits it marketed to her as a separate plan tailored to her needs as a working owner.

The facts in this case reveal an abusive course of treatment of an insured by a disability insurer who assumed it was operating under the protective cloak of ERISA. This scenario is played out across the country in the name of safeguarding workers. The only safeguarding Tierney as a working owner needs in the case at hand is safeguarding from the unreasonable conduct of her disability insurer offered by state insurance laws and regulations. These state law safeguards, however, are exactly what UNUM seeks to deny Tierney through its defensive use of ERISA.

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[12] Indeed, in Texas, owners of a closely held corporation owe each other certain obligations, including fiduciary duties. See *Davis v. Sheerin*, 754 S.W.2d 375, 382-83 (Tex.App. – Houston [14th Dist.] 1988, writ denied). In this way, closely held corporations are very similar to partnerships.

CONCLUSION

For the reasons discussed above, Tierney respectfully urges the Court to deny UNUM's Petition for Writ of Certiorari.

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